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Hamimah bt Idruss v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-09–80–03 OF 2017
YAACOB MD SAM, ZABARIAH YUSOF AND RAVINTHRAN JJCA
2 MARCH 2020

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged under s 109 of Penal Code for abetment of offence of committing forgery for purpose of cheating under s 468 of Penal Code and s 4(1) of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLA') — Appellant convicted and sentenced to*
D *imprisonment — Whether charge defective — Whether actus reus of predicate offence proven — Whether safe to rely on evidence of accomplice — Whether element of intention under s 468 of Penal Code was proven — Whether AMLA charges proven — Whether sentence excessive — Whether pecuniary penalty provision in s 55 of AMLA applicable*

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The appellant, a medical doctor, and her husband had founded a pharmaceutical company, Safire Pharmaceuticals Sdn Bhd ('Safire'). They later expanded Safire and took a large loan of RM35m from Bumiputra Commercial Bank. Although, the appellant and her husband became minority
F shareholders with 18% of the shares of Safire, she continued to manage Safire. Unfortunately, the business of Safire did not fare well and became indebted to the tune of RM51m. The national asset management company ('Danaharta') stepped in to supervise the affairs of Safire in 2009. Although a moratorium of two years was granted to protect the company from lawsuits, the debt situation
G did not improve and at the end of two years, Safire was placed under the management of a special administrator appointed by Danaharta in 2011. The appellant continued her efforts to raise funds for Safire and was introduced to one Hendry Toon, who assured the appellant that funds could be raised from a foreign financial services institution, ie Siemens Financial Services Ltd
H ('SFA'). SFA would purchase receivables in the form of guaranteed promissory notes and in exchange would transfer funds. The gravamen of the charges against the appellant was that she directed SP47 who was the marketing manager of Safire to forge the promissory notes in order to deceive SFA to provide funds that ultimately found its way into the hands of Hendry Toon and
I the appellant. SP47 prepared ten promissory notes purportedly issued by Safire and guaranteed by Pharmaniaga Bhd and the Ministry of Health and forged the signature of SP8, the then chief operating officer of Pharmaniaga Bhd. SP47 accepted a reward of RM200,000 from the appellant. The prosecution also tendered the evidence to the effect that the monies from SFA were routed

to Malaysia through a Hong Kong based company to the six accounts controlled by Hendry Toon through his Medbridge group of companies and the bank account of Azam Rahmat Sdn Bhd, which was controlled by the appellant and personal bank accounts of the appellant and her daughter. The monies that were transmitted to the eight accounts and received by the appellant were the subject matter of the eight money laundering charges. The appellant was charged in three separate cases. In Case No 62–611–04, the appellant faced ten charges under s 109 of the Penal Code for abetment of the offence of committing forgery for the purpose of cheating under s 468 of the Penal Code and was sentenced to three years imprisonment each. In Case No 62–169–04, she faced seven charges under s 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA') and in Case No 62–407–04, she was charged under AMLA. In respect of the eight AMLA charges, she was sentenced to one-year imprisonment each. All the terms of imprisonment terms were ordered to run from the date of sentence. However, a stay of execution was granted. In addition, in respect of the AMLA charge under s 4(1), the prosecution applied for a pecuniary penalty to be imposed on the appellant under s 55(2) for the proceeds of unlawful activity that were not traced or recovered. The sessions court judge allowed the application and imposed a pecuniary penalty of RM6,394,530.72. The High Court affirmed the convictions and sentence passed by the sessions court. Hence, this appeal by the appellant.

Held, affirming the convictions and sentences by the sessions court:

(1) The wording of the abetment charge in the case of *Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240 indicated that failure to state the particular limb of s 107 of the Penal Code or particulars of the exact abetment was a non-issue. The case of *Aisyah bt Mohd Rose & Anor v Public Prosecutor* [2016] 1 MLJ 840 represented the correct legal position in respect of the particulars to be given in framing an abetment charge. In the premises, the appellant was not misled in her defence. Even if there was a legal requirement to state the exact particulars or the specific limb of s 107 of the Penal Code in the abetment charge, s 422 of the Criminal Procedure Code ('the CPC') should come to the aid of the prosecution as there was no failure of justice. Section 156 of the CPC also enacted that no error or omission in the charge was material unless the accused was misled in his defence. The accused took the witness stand to deny the allegations of SP47 and gave her own account of the events that led to the procurement of funds from SFA. Therefore, the argument that the charges were fatally defective on account of lack of particulars was without merit as the appellant was not prejudiced in her defence (see paras 27–28 & 30–31).

(2) It did not necessarily mean that the false document must on the face of it appear to be a perfect document. The false document must be legally

capable of affecting the fraud intended. Therefore, the argument that the promissory notes in question were not false documents merely because they contained several defects that were not detected was not supported. SP47 did forgery when he signed the name of SP8 without the latter's authority or knowledge on promissory notes in question on the orders of the appellant. Therefore there was no merit in the second ground (see paras 33 & 35).

(3) An accomplice was a competent witness. Both the sessions court judge and the High Court judge were mindful that SP47 was an accomplice and the appellant paid him RM200,000. The sessions court judge found that his evidence was amply corroborated by the testimonies of other witnesses and the documentary evidence. SP47 was a subordinate of the appellant and in all probability he would not have forged the signature of SP8 if he was not ordered to do so by the appellant. The beneficiary of the funds procured through the forged promissory notes was the appellant as the money was used to redeem the debts of Safire which was a company founded and partially owned by her. In light of the corroboration found by the sessions court judge and the assessment of the credibility of SP47, there was no merit in the third ground raised by the appellant (see para 36).

(4) Apart from the reference to the forged documents including the invoices which were used as genuine supporting documents to procure funding via the forged promissory notes, the sessions court judge was mindful that SP47 forged the promissory notes on the instruction of the appellant for the purpose of cheating. In the premises, the sessions court judge did not confuse the element of intention required under s 468 of the Penal Code with the element of intention under ss 463 and 471 of the Penal Code. The sessions court judge drew the correct inferences from evidence when he found that the element of intention under s 468 of the Penal Code was proven. As the funds were sourced using the forged promissory notes, the inference that the appellant never intended to pay back the huge sum of USD12m was correctly drawn (see para 39).

(5) As the prosecution had proved the funds in question were procured from the foreign financial company with the use of the forged promissory notes which were the subject matter of the ss 109/468 charges, the funds undeniably constituted proceeds of 'unlawful activity'. Whether the appellant controlled all the said bank accounts was not an ingredient of the offence in question. The essential ingredient was whether the appellant knowingly received any part of the proceeds of unlawful activity. The appellant did not deny using the monies to pay the debt of Safire. There was no merit in the submission that the prosecution did not call witnesses from overseas to prove the exact 'money trail' through which the funds reached the shores of Malaysia as local bank officers

testified that the funds were ultimately routed to Malaysia through Goodrich Overseas Group of Hong Kong into bank accounts in Malaysia controlled by Hendry Toon and the appellant (see paras 40–42).

(6) Having regard to the amount of money involved and the degree of culpability on the part of the appellant, the punishment imposed could not be regarded in any way as excessive. Having considered the calculated manner in which the offence was committed and the huge amount of funds procured from an overseas financial company, the sessions court had not erred in rejecting the plea that the appellant be bound over under s 294 of the CPC on a good behaviour bond. The sentence of imprisonment imposed by the sessions court was reasonable (see paras 43–44).

(7) The sessions court did not impose a fine under s 4(1) of the AMLA but imposed a pecuniary penalty under s 55(2) of the AMLA. In the premises, the argument that the sessions court exceeded its power by imposing a fine beyond the limit prescribed in s 4(1) of the AMLA was without merit. The submission of the prosecution that a large sum of over RM6m was not recovered was based on the evidence of the investigating officer. It was indisputable that the total laundered sum under eight charges was RM41,337,727.11 and only RM34,987,467.29 was recovered. In the premises, the total sum that could not be traced was ascertainable. Therefore, there was no reason why the pecuniary penalty provision in s 55 of the AMLA could not apply (see paras 46–48).

[Bahasa Malaysia summary

Perayu, seorang doktor perubatan, dan suaminya telah menubuhkan syarikat farmaseutikal, Safire Pharmaceuticals Sdn Bhd ('Safire'). Mereka kemudian mengembangkan Safire dan mengambil pinjaman besar berjumlah RM35 juta dari Bumiputra Commercial Bank. Walaupun perayu dan suaminya menjadi pemegang saham minoriti dengan 18% saham Safire, dia terus menguruskan Safire. Malangnya, perniagaan Safire tidak berjalan dengan baik dan berhutang sebanyak RM51 juta. Syarikat pengurusan aset nasional ('Danaharta') campur tangan untuk mengawasi urusan Safire pada tahun 2009. Walaupun moratorium dua tahun diberikan untuk melindungi syarikat daripada tuntutan mahkamah, keadaan hutang tidak bertambah baik dan pada akhir dua tahun, Safire diletakkan di bawah pengurusan pentadbir khas yang dilantik oleh Danaharta pada tahun 2011. Perayu meneruskan usaha untuk mengumpulkan dana untuk Safire dan diperkenalkan kepada seorang Hendry Toon, yang meyakinkan perayu bahawa dana dapat diperoleh dari institusi perkhidmatan kewangan asing, iaitu Siemens Financial Services Ltd ('SFA'). SFA akan membeli penyerahakkan dalam bentuk jaminan nota janji dan sebagai pertukaran akan memindahkan dana. Inti pati pertuduhan terhadap perayu adalah bahawa dia mengarahkan SP47 yang merupakan pengurus pemasaran Safire untuk memalsukan nota janji untuk menipu SFA untuk

memberikan dana yang akhirnya berhasil masuk ke tangan Hendry Toon dan perayu. SP47 menyiapkan sepuluh nota janji yang kononnya dikeluarkan oleh Safire dan dijamin oleh Pharmaniaga Bhd dan Kementerian Kesihatan dan memalsukan tandatangan SP8, ketua pegawai operasi Pharmaniaga Bhd ketika itu. SP47 menerima ganjaran berjumlah RM200,000 daripada perayu. Pihak pendakwaan juga memberikan bukti bahawa wang dari SFA dihantar ke Malaysia melalui sebuah syarikat yang berpangkalan di Hong Kong ke enam akaun yang dikendalikan oleh Hendry Toon melalui kumpulan syarikat Medbridge dan akaun bank Azam Rahmat Sdn Bhd, yang dikendalikan oleh perayu dan akaun bank peribadi perayu dan anak perempuannya. Wang yang dihantar ke lapan akaun dan diterima oleh perayu adalah perkara subjek lapan tuduhan pengubahan wang haram. Perayu didakwa dalam tiga kes berasingan. Dalam Kes No 62–611–04, perayu menghadapi sepuluh tuduhan di bawah s 109 Kanun Keseksaan kerana bersubahat melakukan kesalahan memalsukan dengan tujuan menipu di bawah s 468 Kanun Keseksaan dan masing-masing dihukum tiga tahun penjara. Dalam Kes No 62–169–04, perayu menghadapi tujuh tuduhan berdasarkan s 4(1) Akta Pencegahan Pengubahan Wang Haram 2001 ('Akta') dan dalam Kes No 62–407–04, dia didakwa di bawah Akta. Sehubungan dengan lapan tuduhan Akta, masing-masing dijatuhi hukuman penjara satu tahun. Semua syarat hukuman penjara diperintahkan bermula dari tarikh hukuman. Namun, penangguhan pelaksanaan diberikan. Selain itu, sehubungan dengan tuduhan Akta di bawah s 4(1), pihak pendakwaan meminta agar hukuman kewangan dijatuhkan ke atas perayu di bawah s 55(2) atas hasil kegiatan tidak sah yang tidak dikesan atau dipulihkan. Hakim mahkamah sesyen membenarkan permohonan itu dan menjatuhkan hukuman kewangan sebanyak RM6,394,530.72. Mahkamah Tinggi mengesahkan sabitan dan hukuman yang dijatuhkan oleh mahkamah sesyen. Oleh itu, rayuan ini oleh perayu.

Diputuskan, mengesahkan sabitan dan hukuman oleh mahkamah sesyen:

(1) Kata-kata pertuduhan bersubahat dalam kes *Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240, FC menunjukkan bahawa kegagalan menyatakan bahagian tertentu s 107 Kanun Keseksaan atau butir-butir mengenai subahat yang tepat adalah bukan isu. Kes *Aisyah bt Mohd Rose & Anor v Public Prosecutor* [2016] 1 MLJ 840 mewakili kedudukan undang-undang yang betul berkenaan dengan butir-butir yang harus diberikan dalam membentuk tuduhan bersubahat. Oleh itu, perayu tidak diperdaya dalam pembelaannya. Walaupun ada syarat undang-undang untuk menyatakan butir-butir yang tepat atau cabang tertentu s 107 Kanun Keseksaan dalam tuduhan bersubahat, s 422 Kanun Tatacara Jenayah ('KTJ') harus membantu pihak pendakwaan kerana tidak ada kegagalan keadilan. Seksyen 156 KTJ juga menetapkan bahawa tidak ada kesalahan atau kesilapan dalam pertuduhan itu material kecuali tertuduh diperdaya dalam

pembelaannya. Tertuduh menjadi saksi untuk menyangkal tuduhan SP47 dan memberikan laporannya sendiri mengenai kejadian yang menyebabkan perolehan dana dari SFA. Oleh itu, hujahan bahawa pertuduhan tersebut cacat kerana kekurangan butir-butir adalah tidak wajar kerana perayu tidak prejudis dalam pembelaannya (lihat perenggan 27–28 & 30–31).

(2) Ia tidak semestinya bermaksud bahawa dokumen palsu itu mesti kelihatan di atasnya sebagai dokumen yang sempurna. Dokumen palsu mestilah berupaya mempengaruhi penipuan yang dimaksudkan. Oleh itu, hujahan bahawa nota janji tersebut bukan dokumen palsu hanya kerana mengandungi beberapa kecacatan yang tidak dapat dikesan tidak disokong. SP47 melakukan pemalsuan ketika dia menandatangani nama SP8 tanpa kebenaran atau pengetahuan mengenai nota janji yang dipersoalkan atas perintah perayu. Oleh itu, tidak ada merit di alasan kedua (lihat perenggan 33 & 35).

(3) Rakan sejenayah adalah saksi yang kompeten. Kedua-dua hakim mahkamah sesyen dan hakim Mahkamah Tinggi sedar bahawa SP47 adalah rakan sejenayah dan perayu membayarnya RM200,000. Hakim mahkamah sesyen mendapati bahawa keterangannya disokong oleh keterangan saksi lain dan keterangan dokumentari. SP47 adalah pekerja bawahan perayu dan kemungkinan besar dia tidak akan memalsukan tandatangan SP8 jika dia tidak diperintahkan untuk melakukannya oleh perayu. Benefisiari dana yang diperoleh melalui nota janji palsu adalah perayu kerana wang tersebut digunakan untuk menebus hutang Safire yang merupakan syarikat yang diasaskan dan sebahagiannya dimiliki olehnya. Mengikut sokongan yang diputuskan oleh hakim mahkamah sesyen dan penilaian kredibiliti SP47, tidak ada merit dalam alasan ketiga yang dikemukakan oleh perayu (lihat perenggan 36).

(4) Selain merujuk kepada dokumen palsu termasuk invois yang digunakan sebagai dokumen sokongan yang tulen untuk mendapatkan dana melalui nota janji palsu, hakim mahkamah sesyen sedar bahawa SP47 memalsukan nota janji atas arahan perayu untuk tujuan menipu. Oleh itu, hakim mahkamah sesyen tidak keliru unsur niat yang dikehendaki di bawah s 468 Kanun Keseksaan dengan unsur niat di bawah ss 463 dan 471 Kanun Keseksaan. Hakim mahkamah sesyen mengambil kesimpulan yang betul dari keterangan ketika dia mendapati bahawa unsur niat di bawah s 468 Kanun Keseksaan telah terbukti. Oleh kerana dana itu diperoleh menggunakan nota janji palsu, kesimpulan bahawa perayu tidak pernah bermaksud membayar balik sejumlah besar USD12 juta diputuskan dengan betul (lihat perenggan 39).

(5) Oleh kerana pihak pendakwaan telah membuktikan dana tersebut diperoleh dari syarikat kewangan asing dengan menggunakan nota janji palsu yang menjadi pokok pertuduhan ss 109/468, dana tersebut tidak

dapat disangkal merupakan hasil dari 'aktiviti tidak sah'. Sama ada perayu mengawal semua akaun bank tersebut bukan merupakan unsur kesalahan yang dimaksudkan. Inti pentingnya ialah sama ada perayu dengan sengaja menerima sebahagian daripada hasil aktiviti tidak sah. Perayu tidak menafikan menggunakan wang untuk membayar hutang Safire. Tidak ada merit dalam hujahan bahawa pihak pendakwaan tidak memanggil saksi dari luar negara untuk membuktikan 'jejak wang' yang tepat di mana dana itu sampai ke Malaysia kerana pegawai bank tempatan memberi keterangan bahawa dana tersebut akhirnya dihantar ke Malaysia melalui Goodrich Overseas Group Hong Kong ke dalam akaun bank di Malaysia yang dikendalikan oleh Hendry Toon dan perayu (lihat perenggan 40–42).

(6) Dengan mengambil kira jumlah wang yang terlibat dan kesalahan perayu, hukuman yang dijatuhkan tidak dapat dianggap sebagai sesuatu yang berlebihan. Setelah mempertimbangkan cara yang dihitung di mana kesalahan itu dilakukan dan sejumlah besar dana yang diperoleh dari syarikat kewangan luar negara, mahkamah sesyen tidak terkhilaf dalam menolak rayuan bahawa perayu diberikan ikatan di bawah s 294 KTJ atas ikatan tingkah laku yang baik. Hukuman penjara yang dijatuhkan oleh mahkamah sesyen adalah wajar (lihat perenggan 43–44).

(7) Mahkamah sesyen tidak menjatuhkan denda di bawah s 4(1) Akta tetapi menjatuhkan hukuman kewangan di bawah s 55(2) Akta. Oleh itu, hujahan bahawa mahkamah sesyen melebihi kuasanya dengan menjatuhkan denda melebihi had yang ditetapkan dalam s 4(1) Akta adalah tanpa merit. Hujahan pihak pendakwaan bahawa sejumlah besar wang berjumlah lebih dari RM6 juta tidak diperoleh adalah berdasarkan bukti pegawai penyiasat. Tidak dapat dipertikaikan bahawa jumlah keseluruhan wang yang dilaburkan di bawah lapan pertuduhan adalah RM41,337,727.11 dan hanya RM34,987,467.29 yang diperolehi. Dengan itu, jumlah keseluruhan yang tidak dapat dikesan dapat dipastikan. Oleh itu, tidak ada alasan mengapa peruntukan hukuman kewangan dalam s 55 Akta tidak dapat dilaksanakan (lihat perenggan 46-48).]

Cases referred to

Aisyah bt Mohd Rose & Anor v PP [2016] 1 MLJ 840, CA (folld)
Chin Chan Leong v PP & Anor and another appeal [2010] 5 MLJ 312, CA (consd)
Datuk Haji Harun bin Haji Idris & Ors v PP [1978] 1 MLJ 240, FC (refd)
Datuk Tiah Thee Kian v PP and another appeal [2002] 1 MLJ 585, HC (refd)
Lim Hong Yap v PP [1978] 1 MLJ 154 (folld)
Ng Terk Chai v PP and other appeals [2013] 2 MLJ 375, CA (refd)
Ng Yu Wah v PP [2012] 9 MLJ 325, HC (distd)
PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180 (refd)

PP v KM Basheer Ahmad [1982] 2 MLJ 78 (distd)
Sanjeev Kumar a/l Veerasingam v PP and other appeals [2015] 2 MLJ 589, CA (refd)
Tan Hooi Chong v PP (Criminal Appeal No (MT-5) 42–11 of 2008) (unreported), HC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3, 4(1), 55, 55(2)
Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 s 14
Criminal Procedure Code ss 154, 156, 294, 422
Evidence Act 1950 s 32(1)(a)
Penal Code ss 107, 109, 463, 464, 468, 471
Pengurusan Danaharta Nasional Berhad Act 1988
Securities Industry Act 1983 (Repealed by the Capital Markets and Services Act 2007) ss 84(1), 88B

Appeal from: Criminal Trial No 42S–(27, 28 & 29)–03 of 2012 (High Court, Kuala Lumpur)

Harvinderjit Singh (Sara Ann Chay Sue May and Harvinder Singh Sidhu with him) (Vin Law Co) for the appellant.
Mohd Dusuki bin Mokhtar (Asmah bt Musa with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ravinthran JCA:

INTRODUCTION

[1] The appellant was convicted of a total 18 charges and sentenced imprisonment on 21 March 2012 by the sessions court. The High Court affirmed the convictions and sentence passed by the sessions court. She has appealed against all the convictions and imprisonment terms to this court.

THE CHARGES

[2] The appellant was charged in three separate cases. In Case No 62–611–04, she faced ten charges under s 109 of the Penal Code for abetment of the offence of committing forgery for the purpose of cheating under s 468. She was charged with having abetted one Yusaini bin Wan Abi Sabian to forge ten promissory notes. In Case No 62–169–04, she faced seven charges under s 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA'). In Case No 62–407–04, she faced one charge under AMLA.

[3] In respect of the ten charges in Case No 62–611–04 under ss 109 and 468 of the Penal Code, the appellant was sentenced to three years imprisonment each. In respect of the eight AMLA charges in Case No 62–169–04 and Case No 62–407–04, she was sentenced to one-year imprisonment each. All the imprisonment terms were ordered to run from the date of sentence, ie 21 March 2012. However, a stay of execution was granted. In addition, in respect of the AMLA charge under s 4(1), the prosecution applied for a pecuniary penalty to be imposed on the appellant under s 55(2) for proceeds of unlawful activity that are not traced or recovered. The sessions court judge allowed this application and imposed a pecuniary penalty of RM6,394,530.72. In default of payment, she was ordered to serve a further one-year imprisonment.

CASE OF THE PROSECUTION

[4] The total amount of money involved in the 18 charges was USD12m. The prosecution called 54 witnesses to lead evidence at the lengthy trial before sessions court. I shall summarise below the essential evidence pertaining to the charges in question and the findings of the sessions court and the High Court before considering the grounds of appeal.

[5] Briefly stated, the case of the prosecution was as follows. The appellant, a medical doctor, and her husband had founded a pharmaceutical company (Safire Pharmaceuticals Sdn Bhd) that was initially successful. They later expanded this company by receiving injection of capital from a State Economic Development Corporation (SEDC), ie the Perbadanan Kemajuan Ekonomi Negeri Perak. Safire Pharmaceticals Sdn Bhd ('Safire') moved its operational base to an industrial site in Perak. Safire also took a large loan of RM35m from Bumiputra Commercial Bank ('BCB').

[6] Although, the appellant and her husband became minority shareholders with 18 per cent of the shares of Safire, she continued to manage Safire. Unfortunately for the appellant, the business of Safire did not fare well and became indebted to the tune of RM51m. The national asset management company ('Danaharta') which was incorporated under the Pengurusan Danaharta Nasional Berhad Act 1988 stepped in to supervise the affairs of Safire in 2009. A moratorium of two years was granted to protect the company from lawsuits. The debt situation did not improve and at the end of two years, Safire was placed under the management of a Special Administrator ('SA') appointed by Danaharta in 2011.

[7] Since the company fell into the red, the appellant as the founder had been seeking ways and means to save the company from the financial morass it was enmeshed in. She continued her efforts to raise funds for Safire even after

the SA was appointed by Danaharta. She was introduced to one Hendry Toon. It must be mentioned here that Hendry Toon died before the trial commenced. However, the investigating officer managed to interview him and record his cautioned statement. The caution statement was admitted under s 32(1)(a) of the Evidence Act 1950. Returning to the narrative, Hendry Toon assured the appellant that funds can be raised from a foreign financial services institution, ie Siemens Financial Services Ltd ('SFA'). SFA would purchase receivables in the form of guaranteed promissory notes and in exchange would transfer funds. The ten charges under ss 109/468 of the Penal Code pertain to ten forged promissory notes purchased by SFA for the sum of USD12m. The gravamen of the charges against the appellant was that she directed one Yusaini bin Wan Abi Sabian ('SP47') who was the marketing manager of Safire to forge the promissory notes in order to deceive SFA to provide funds that ultimately found its way into the hands of Hendry Toon and the appellant.

[8] The star witness for the prosecution was undoubtedly SP47. He told the court that the appellant asked him to prepare some documents to 'save' Safire. The appellant told him that the documents would be used to obtain funding for Safire. He was asked to prepare promissory notes, circular resolutions and other documents. The appellant gave him specimen documents for the task at hand. SP47 then prepared ten promissory notes that were purportedly issued by Safire and guaranteed by Pharmaniaga Bhd and the Ministry of Health. He forged the signature of one Dr Effendy Tenang ('SP8') by signing the latter's name on the said ten promissory notes. SP8 was then the Chief Operating Officer of Pharmaniaga Bhd. SP47 said he would not have forged the signature of SP8 if he was not ordered to do so by the appellant and that he was assured that nothing would happen to him. Nonetheless, for his trouble, he later accepted a handsome reward of RM200,000 from the appellant. The prosecution called SP8 to the witness stand. He was shown the said promissory notes. He denied that he ever signed the said promissory notes.

[9] Faizul bin Mohd Zawawi ('SP19') was the finance manager of Safire at the material time. He signed the promissory notes on the orders of the appellant who told him that it was necessary to save Safire. SP19 did not obtain the consent of the SA before signing the promissory notes. He also prepared a host of other documents including invoice and delivery orders purportedly issued by Great Econ Power Sdn Bhd, copy of an agreement between Safire and Great Econ Power Sdn Bhd and circular resolutions. All these documents were later attested before a commissioner of oaths. As a reward, SP19 was paid a sum of RM30,000 through a cheque issued by Azam Rahmat Sdn Bhd. The prosecution proved that the company is linked to the appellant. The prosecution also called Salehuddin bin Shaari (SP15) who is an executive in Safire about the said invoices and delivery orders. He testified that Safire never

ordered any raw materials from Great Econ Power Sdn Bhd and that his signatures on P15A–D were a result of requests from SP47.

[10] Azhar bin Hussein (SP9) is a director of Pharmaniaga Bhd. He testified that Pharmaniaga Bhd never authorised the issuance of any guarantee for the said promissory notes. He said that his signature on the purported circular resolution of Pharmaniaga Bhd was forged. Abdul Aziz bin Subali (SP18) was a director of Safire. He was asked to sign the circular resolution of Safire in respect of the promissory notes by the appellant in order to 'save' the company. The permission of the SA appointed by Danaharta was not obtained.

[11] The other crucial witness for the prosecution's case was Peter Florian Rek ('SP1'). He was the head of the Credit Portfolio Management at SFA. His department was in charge of purchasing long term receivables which included promissory notes. He said that in 2003, his company purchased the said ten promissory notes (P1–P10) for the sum of USD1.2m each which was purportedly issued by Safire through BCB. He said that the promissory notes were purportedly guaranteed by Pharmaniaga Bhd and the Ministry of Health. One of the supporting documents was a letter issued by the Ministry of Health. However, the purported signatory who is the former Deputy Health Minister denied signing the said letter. SP1 also said that he sought legal advice before effecting payment through an entity called Bon Pour Aval Ltd which is based in London. SP1 was assured that the promissory notes had 'very good credit risk' because they were guaranteed by Pharmaniaga Bhd and the Ministry of Health.

[12] The prosecution also tendered evidence to the effect that the monies from SFA were routed to Malaysia through a Hong Kong based company to the six accounts controlled by Hendry Toon through his Medbridge group of companies and the bank account of Azam Rahmat Sdn Bhd which is controlled by the appellant and personal bank account of the appellant and her daughter (SP17). The monies that were transmitted to these eight accounts and received by the appellant were the subject-matter of the eight money laundering charges.

THE DEFENCE

[13] The appellant gave sworn evidence. Briefly stated, the appellant's defence and the admissions she made are as follows. She admitted meeting Hendry Toon and being impressed with his proposal to solve the financial problems of Safire. She did not inquire into the background of Hendry Toon. She left the preparation of all the relevant documents requested by Hendry Toon to SP47. She firmly denied instructing SP47 to forge the signature of SP8 on the promissory notes. But she agreed that she procured the Safire's circular resolution to authorise the attempt to secure funding through the sale of the

promissory notes to SFA although the SA had not given any approval. She also agreed that she brought the ten promissory notes and the supporting documents to obtain the signature of a commissioner of oaths (SP6). She claimed that she did not read the documents. She gave them only a cursory glance. The documents were later handed over to Hendry Toon.

[14] Crucially, the appellant told the court that the funds that were transferred to the eight accounts in question were mostly utilised to pay the debts of Safire. She said that she prepared two bank drafts ie P203 in the sum of RM17,205,619.05 and P205 in the sum of RM6m. Hendry Toon, on the other hand prepared bank draft P143 in the sum of RM5,794,380. All three bank drafts were given to Danaharta to redeem the debt of Safire. The appellant also admitted that she rewarded Hendry Toon, SP47 and SP19.

FINDING OF SESSIONS COURT AND HIGH COURT

[15] The learned sessions court judge gave careful consideration to the defence of the appellant that she did not give any instruction to SP47 to forge SP8's signature on the promissory notes and that all the documents in question were managed by Hendry Toon and Bon Pour Aval Ltd of London without her direct involvement. However, the learned sessions court judge rejected the defence that the appellant had no knowledge about the forged signature on the promissory notes. He accepted the evidence of SP47 that he was directed by the appellant to forge the signature of SP8. He also found that SP47's testimony is corroborated by other oral and documentary evidence. In the premises, he held that the appellant did not raise any reasonable doubt on the case for the prosecution. He convicted her of all the charges under ss 109/468 of the Penal Code.

[16] In respect of the eight charges under s 4(1) of the AMLA, the learned sessions court judge found that the prosecution had proven the charges beyond reasonable doubt as the appellant had received proceeds of an unlawful activity which was paid out through the accounts stated in the said charges for the purpose of redeeming the debt of Safire.

[17] Upon appeal, the High Court wholly affirmed all the findings of the sessions court for the same reasons and affirmed the conviction and the sentence imposed in respect of all the charges in question. Nonetheless, the sentences were stayed pending appeal to this court.

GROUNDS OF APPEAL

[18] Counsel for appellant addressed the following grounds of appeal before us. They are as follows.

[19] The first ground that was strenuously argued pertains to the manner that the abetment charges were drafted. For ease of reference, we reproduce below one of the ten virtually identical charges:

> First Charge
>
> Bahawa di antara 1 Mac 2003 dan 10 Mac 2003 di pejabat Safire Pharmaceuticals (M) Sdn Bhd, No 33, Persiaran Industri, Seri Damansara, di dalam Wilayah Persekutuan Kuala Lumpur, Yusaini bin Wan Abi Sabian (K/P No 690707-02-5289) telah memalsukan suatu dokumen iaitu *promissory note* Safire Pharmaceuticals (M) Sdn Bhd yang bernombor rujukan SPSB/BPA/001 bernilai USD 1.2 juta dengan niat ianya digunakan untuk tujuan menipu iaitu satu kesalahan di bawah seksyen 468 Kanun Keseksaan dan pada tarikh tersebut kamu telah bersubahat melakukan kesalahan tersebut di mana kesalahan tersebut telah dilakukan hasil persubahatan kamu dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 109 Kanun Keseksaan dibaca bersama seksyen 468 Kanun yang sama.

[20] Counsel for appellant's argument is as follows. SP47 is the principal offender. He was alleged to have committed forgery of a document for the purpose of cheating. It is an offence under s 468 of the Penal Code. The appellant is charged with abetting SP47 to commit the said offence. Section 109 of the Penal Code provides the punishment for the offence of abetment. Unless, otherwise provided the punishment is the same as the punishment for the act committed in consequence for the abetment. The appellant was charged with committing the offence of abetment under s 109 read together with s 468. The offence of abetment is defined in s 107 of the Penal Code. The provision (shorn of the Explanations and Illustrations) read as follows prior to amendment on 31 January 2012:

> A person abets the doing of a thing who —
>
> (a) instigates any person to do that thing;
>
> (b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> (c) intentionally aids, by any act or illegal omission, the doing of that thing.

[21] It must be noted that any one of the above mentioned three limbs constitute the act of abetment. The complaint of counsel for appellant is that the abetment charges under ss 109/468 in this case do not specify the exact limb of abetment that is stated in s 107. He argued that this is a breach of s 154 of the Criminal Procedure Code because the charge failed to a particularise the manner the offence was committed. Section 154 (shorn of Illustrations) reads as follows:

> 154 When manner of committing offence must be stated

When the nature of the case is such that the particulars mentioned in sections 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

[22] Counsel for appellant cited three authorities to support his argument that the abetment charges are fatally defective. In *Datuk Tiah Thee Kian v Public Prosecutor and another appeal* [2002] 1 MLJ 585, the High Court held that the abetment charge was defective because the particular limbs of s 107 were not stated in the charge. This case was followed in the unreported case of *Tan Hooi Chong v Public Prosecutor* (Criminal Appeal No (MT-5) 42–11 of 2008). The third authority he cited was the Court of Appeal case of *Sanjeev Kumar a/l Veerasingam v Public Prosecutor and other appeals* [2015] 2 MLJ 589. The Court of Appeal held that it is not sufficient to describe the act of abetment with the words 'telah bersubahat' without specifying in what manner the act of abetment was done. The relevant passage reads as follows:

We note with dismay, however, that the charges, unfortunately, do not specify in what manner the acts of abetment were done by the first and second appellants. All that is stated in each of the four charges to describe the acts of abetment are only the words 'telah bersubahat'. Thus the charges are very vague, and are materially and substantially defective (see *Datuk Tiah Thee Kian v Public Prosecutor and another appeal* [2002] 1 MLJ 585; [2002] 2 CLJ 21); and the manner they are drafted contravenes s 154 of the Criminal Procedure Code. On this ground alone the appeals of the first and second appellants ought to be allowed.

[23] As can be seen in the above passage, the only authority cited in support was the case of *Datuk Tiah Thee Kian v Public Prosecutor and another appeal*. In later case of *Aisyah bt Mohd Rose & Anor v Public Prosecutor* [2016] 1 MLJ 840, another panel of the Court of Appeal declined to follow *Sanjeev Kumar a/l Veerasingam v Public Prosecutor and other appeals*. The charge in question did not state the manner of abetment and the court was invited to follow the *Sanjeev Kumar* case and hold that the charges were defective. The Court of Appeal in the *Aisyah* case said as follows after setting out the three separate limbs of s 107:

[33] While we agree that the charge against the second appellant did not state the manner of abetment, following the decision of this court in *Chin Chan Leong v Public Prosecutor & Anor and another appeal* [2010] 5 MLJ 312, we find that the charge was not defective. In *Chin Chan Leong*, this court had stated that the proposition that the prosecution is at liberty to prefer a charge of abetment generally is supported by weighty authorities (see *Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240 (FC); *Pasupathy a/l Kanagasaby v Public Prosecutor* [2005] 1 MLJ 493 and *Loh Liang Gun & Anor v Public Prosecutor* [2007] 5 MLJ 159). We note that none of these cases were cited in *Sanjeev Kumar*, relied upon by learned counsel for the appellants.

[24] The Court of Appeal also found that on the facts of the case, the accused was not misled in his defence by the lack of particulars of abetment. This finding is stated in the following passage:

> [34] Further, we do not find anything in the records of appeal which suggest that the second appellant was confused by the lack of particulars of abetment. To the contrary, we find from the records of appeal that the defence of the second appellant that the acts were done pursuant to his client's instructions was not in any way hindered by the absence of the manner of abetment. The second appellant did not dispute the fact that he received the cheques from the intermediaries and that he had given them to the first appellant, which resulted in the cheques being deposited into his client's account and that thereafter he withdrew the money. In dismissing the appellants' appeal, the High Court judge found that the second appellant had conspired with the first appellant to commit the offence of criminal breach of trust. We see no reason to disagree with the High Court judge.

[25] Counsel for appellant has invited us to follow the decision in the *Sanjeev Kumar* case for the reason that the authorities cited in the *Aisyah* case do not support the conclusion that the manner of abetment need not be stated. He submitted that in *Chin Chan Leong v Public Prosecutor & Anor and another appeal* [2010] 5 MLJ 312, the particulars of the exact act of abetment were set out in the charge. We have considered the judgment of the Court of Appeal in the *Chin Chan Leong* case. The first accused (Chin Chan Leong) was the principal offender in that case. He faced two charges under s 84(1) of the Securities Industry Act 1983 (Act 280) which is punishable under s 88B of the same Act. The second accused was charged with two counts of abetting the first accused to commit said offences. We reproduce below the first charge against the second accused. It is almost identical to the second charge. It reads as follows:

> First Charge
>
> That you, between 18 November 2003 and 20 January 2004, at Avenue Securities Sdn Bhd, Ground Floor, THB Satu, Jalan Damansara Endah, Damansara Heights, 50490 Kuala Lumpur, abetted Chin Chan Leong (NRIC No 531023–10–5669) who created a misleading appearance of active trading in Fountain View Development Berhad (Company No 585360–T) shares on a stock market, that is, the Kuala Lumpur Stock Exchange (now known as Bursa Malaysia Securities Berhad), where Chin Chan Leong was indirectly being concerned in transactions of sale and purchase of Fountain View Development Berhad shares that do not involve any change in the beneficial ownership of the Fountain View Development Berhad shares, through the central depository securities accounts listed in the Appendix to this charge, and the said offence was committed pursuant to your abetment and you have thereby committed an offence under section 84(1) read together with section 122C(c) of the Securities Industry Act 1983 (Act 280) punishable under section 88B of the same Act.

[26] A careful reading of the above mentioned charge would reveal that the detailed particulars pertain to the principal offence committed by the first accused. Insofar as the abetment accusation against the second accused is concerned, the charge only states that the second accused 'abetted' first accused. We therefore disagree with counsel for appellant when he said that particulars of the exact act of abetment were given in the charge in the said case.

[27] Counsel for appellant then submitted that in the case of *Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240, the Federal Court did not make any pronouncement to the effect that the particulars of the exact act of abetment need not be stated in the charge. Whilst we agree that this point was not discussed in the Federal Court judgment, we note that the wording of the abetment charge in *Datuk Haji Harun*'s case indicates that failure to state the particular limb of s 107 or particulars of the exact abetment was a non-issue. The abetment charge in *Datuk Haji Harun*'s case (reproduced from the judgment of the High Court which is reported as *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180) reads as follows:

> That you jointly on or about the 5th day of May, 1975, at Kuala Lumpur in the Federal Territory, abetted the commission of the offence of criminal breach of trust of certain property, to wit, three million ordinary shares of Dunlop Estates Berhad and MS1 million Debenture Stocks of Kuala Lumpur Kepong Berhad belonging to Bank Kerjasama Rakyat Malaysia Berhad by one Datuk Abu Mansor bin Mohd. Basir which offence was committed in consequence of your abetment and that you thereby committed an offence punishable under sections 109 and 406 of the Penal Code.'

[28] The format of the charge in the said case is similar to the instant case, ie the abetment charge is preferred generally whilst particulars are given of the principal offence. Counsel for appellant also submitted that the other cases cited in the *Aisyah* case do not contain the pronouncement that the particular limbs of s 107 need not be stated or that particulars of the exact acts of abetment can be omitted. Be that as it may, we are of the view that *Aisyah's* case represents the correct legal position in respect of the particulars to be given in framing an abetment charge. It also accords with the practice adopted in the great majority of reported cases.

[29] We also derive support for our conclusion from the following passage in the judgment of the Singapore Court of Appeal in the case of *Lim Hong Yap v Public Prosecutor* [1978] 1 MLJ 154 that was cited by the learned deputy public prosecutor:

> It is clear that the charge as framed fulfilled the requirements of section 151 and section 152(1) of the Criminal Procedure Code and in our opinion the particulars contained in the charge were sufficient to give the appellant notice of the matter with which he was charged. It is to be observed that under section 153 it is only

A when the nature of the case is such that the particulars mentioned in sections 151 and 152 do not give an accused person sufficient notice of the *matter* with which he is charged that the charge must also contain particulars of the *manner* in which the alleged offence was committed as will be sufficient for the purpose of giving him sufficient notice of the matter with which he is charged. In any event, even if there B were insufficient particulars in the charge as framed, such omission cannot, in terms of section 155, be regarded as material unless it is shown by the appellant that he had in fact been misled by such omission.

[30] Similarly, it was noted by the Court of Appeal in the *Aisyah* case that the C accused was not misled merely because the lack of particulars. Coming to the facts of the instant case, the appellant was charged with abetting her subordinate ('SP47') into committing forgery with respect to the promissory notes in question. SP47 testified he was instructed by the appellant to commit forgery. The appellant denied outright giving any such instruction. In the D premises, we fail to see in what manner the appellant was misled in her defence.

[31] We also hold that even if there was a legal requirement to state the exact particulars or the specific limb of s 107 in the abetment charge, s 422 of the Criminal Procedure Code should come to the aid of the prosecution as there is E no failure of justice. Counsel for appellant submitted on the authority of *Ng Terk Chai v Public Prosecutor and other appeals* [2013] 2 MLJ 375 that the omission in this case is an illegality that cannot be cured as compared to an irregularity. However, the cases he cited are not on point. In *Public Prosecutor v KM Basheer Ahmad* [1982] 2 MLJ 78, there was a failure to obtain the fiat of F the public prosecutor. This case is not relevant as it has nothing to do with an omission in stating particulars in a charge. In *Ng Yu Wah v Public Prosecutor* [2012] 9 MLJ 325, the accused persons were charged with an offence under s 14 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. The High Court held that the charge was defective. That G case is distinguishable as material words of the Act that created the offence in question were omitted. Furthermore, s 422 of the Criminal Procedure Code clearly covers a situation where there could be an omission in a charge as long as it does not occasion a failure of justice. Section 156 of the Criminal Procedure Code also enacts that no error or omission in the charge is material H unless the accused was misled in his defence. The provision reads as follows:

156 Effect of errors

No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error I or omission.

Illustration (b) to the said section is clearly relevant to the instant case whilst illustration (c) does not apply to the fact of this case. We are of the view that Illustration (b) provides a complete answer to the complaint of the counsel for

appellant. Illustration (b) and (c) reads as follows:

(a) *A* is charged with cheating *B*, and the manner in which he cheated *B* is not set out in the charge, or is set out incorrectly. *A* defends himself, calls witnesses, and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(b) *A* is charged with cheating *B*, and the manner in which he cheated B is not set out in the charge. There were many transactions between *A* and *B*, and *A* had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from these facts that the omission to set out the manner of the cheating was, in this case, a material error.

In the instant case, as we noted earlier, the accused took the witness stand to deny the allegations of SP47 and gave her own account of the events that led to the procurement of funds from SFA. Therefore, the argument that the charges were fatally defective on account of lack of particulars is without merit as the appellant was not prejudiced in her defence.

[32] The second ground is that the 'actus reus of the predicate offence is not proven'. This ground of appeal is premised on the argument that the promissory notes in question had many defects and were an incomplete or invalid document. Counsel for appellant cited the following excerpt from *Ratanlal & Dhirajlal's Law of Crimes* (24th Ed) at p 2228:

> But is essential that the false document, when made, must either appear on its face to be or be in fact, one which if true, would possess some legal validity, or in other words must be legally capable of affecting the fraud intended.

[33] In our view, it is telling that in the above mentioned passage, it is stated that document must possess 'some' legal validity. Therefore, it does not necessarily mean that the false document must on the face of it appear to be a perfect document. It is also stated in the above mentioned passage that the false document must be legally capable of affecting the fraud intended. In the instant case, SP1 testified that legal advice was sought in respect of the promissory notes in question from a reputable law firm in Malaysia and no red flags were raised. It is also not disputed that the fraud was ultimately effected as SFA purchased the promissory notes. Therefore, in our view, the above mentioned passage does not support the argument that the promissory notes in question are not false documents merely because they contained several defects that were not detected.

[34] In any event, several *Illustrations* in s 464 of the Penal Code which defines a false document settles the question whether the promissory notes are false documents. Illustration (j) and (k) of s 464 read as follows:

(j) A writes a letter and signs it with B's name without B's authority, certifying that *A*

A is a man of good character and in distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain alms from *Z* and other persons. Here, as *A* made a false document in order to induce *Z* to part with property, *A* has committed forgery.

B *(k) A without B's authority writes a letter and signs it in B's name*, certifying to *A*'s character, intending thereby to obtain employment under *Z*. *A* has committed forgery, inasmuch as he intended to deceive *Z* by the forged certificate, and thereby to induce *Z* to enter into an express or implied contract for service. (Emphasis added.)

C **[35]** In the above *Illustrations*, it is clearly stated that signing a document in somebody's name without his authority 'is forgery'. This is what SP47 did in this case. He signed the name of SP8 without the latter's authority or knowledge on promissory notes in question on the orders of the appellant. We therefore see no merit in the second ground.

D

[36] The third ground canvassed by counsel for appellant is that SP47 is an accomplice and that it is not safe to rely on his evidence. We find no merit in this ground. Under the law, an accomplice is a competent witness. Both E sessions court judge and the High Court judge were mindful that SP47 is an accomplice and the appellant paid him RM200,000. The sessions court judge found that his evidence is amply corroborated by the testimonies of other witnesses and the documentary evidence. It was the appellant who brought all supporting documents to the commissioner of oaths for attestation. It was the F appellant who procured Safire's circular resolution which was also used as a supporting document to the promissory notes when she knew that it was done behind the back of the SA who had been appointed to manage the company. SP19 who is the finance manager of Safire also told the court that the appellant ordered him to sign the promissory notes although the company was under the G management of the SA. Finally, the sessions court judge found that SP47 is a subordinate of the appellant and that in all probability he would not have forged the signature of SP8 if he was not ordered to do so by the appellant. It also did not escape the attention of the sessions court judge that the beneficiary of the funds procured through the forged promissory notes was the appellant as H the money was used to redeem the debts of Safire which is a company founded and partially owned by her. In the light of the corroboration found by the sessions court judge and his assessment of the credibility of SP47, we find no merit in this ground of appeal.

I **[37]** The fourth ground is that the sessions court judge and the High Court judge confused the element of intention that is required under s 468 of the Penal Code with the element of intention under s 463 and 471. Sections 468, 463 and 471 of the Penal Code reads as follows:

468 Forgery for the purpose of cheating

Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

463 Forgery

Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

471 Using as genuine a forged document

Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.

[38] The argument of counsel for appellant is that the mens rea element in ss 463 and 471 is not the same as the mens rea element in s 468. He submitted that the mens rea in s 463 and 471 pertains to the use of a false document as a genuine document. On the other hand, the mens rea element in s 468 pertains to cheating. He cited the following passage in the judgment of the sessions court judge that referred to the use of forged documents as genuine documents:

Di dalam kes ini bukan sahaja eksh P1-P10 merupakan dokumen palsu. Dokumen sokongan lain kepada P1–10, khususnya, invoice dan delivery order daripada Great Econ Power, supply agreement, indent Pharmaniaga kepada Safire yang berjumlah RM45 juta dan guarantee Pharmaniaga Logistics untuk eksh P1–P10 juga merupakan dokumen-dokumen rekaan yang dibuat untuk menunjukkan wang Safire mempunyai kedudukan yang kukuh untuk membayar balik pinjaman yang diperolehi dengan menggunakan eksh P1–P10. *Oleh kerana jelas eksh P1–10 dipalsukan untuk mendapat pinjaman secara tipuan*. (Emphasis added.)

[39] We see no merit in the above ground of appeal for the reason that apart from the reference to the forged documents including the invoices which were used as genuine supporting documents to procure funding via the forged promissory notes, the learned sessions court judge was mindful that SP47 forged the promissory notes on the instruction of the appellant for the purpose of cheating. This is also stated in the last line the above-mentioned passage. In the premises, the learned sessions court judge did not confuse the element of intention that is required under s 468 with the element of intention under ss 463 and 471. It is also our view that the learned sessions court judge drew the correct inferences from evidence when he found that the element of intention under s 468 was proven. As the funds were sourced using the forged promissory notes, the inference that the appellant never intended to pay back the huge sum of USD12m was correctly drawn.

[40] The final ground was that the eight AMLA charges were not proven. We find no merit in this ground for the following reasons. The definition of money laundering in s 3 of the Act includes the act of receiving proceeds of any 'unlawful activity'. Any 'serious offence' that is prescribed in the second schedule to the Act comes within the definition of 'unlawful activity'. The offence created by s 468 of the Penal Code is listed in the second schedule. Therefore, all that the prosecution has to prove is that the appellant received any part of the funds sourced from the forged promissory notes. In the instant case, as the prosecution had proved the funds in question were procured from the foreign financial company with the use of the forged promissory notes which is the subject matter of the ss 109/468 charges, the said funds undeniably constitute proceeds of 'unlawful activity'.

[41] Counsel for appellant submitted that six of the eight bank accounts through which the monies were routed to Malaysia were controlled by Hendry Toon and not the appellant. However, whether the appellant controlled all the said bank accounts is not an ingredient of the offence in question. The essential ingredient is whether the appellant knowingly received any part of the proceeds of unlawful activity. The appellant did not deny using the monies to pay the debt of Safire. The finding of the sessions court judge on this point is found in the following passage of his judgment:

> Wang di dalam akaun-akaun syarikat-syarikat tersebut digunakan untuk menebus kembali hutang Safire. OKT telah menyediakan dua (2) bank draf, iaitu eksh P203 berjumlah RM17,205,619.05 dan P205 yang berjumlah RM6,000,000. Hendry pula menyediakan bank draf eksh P143 yang berjumlah RM5,794,380. Ekshibit P203, P205 dan P143 diberikan kepada Danaharta untuk menebus kembali hutang Safire.

[42] Counsel for appellant also submitted that the prosecution did not call certain witnesses, including witnesses from overseas to prove the exact 'money trail' through which the funds reached the shores of Malaysia. We find no merit in this submission for the following reasons. Local bank officers testified that the funds in question were ultimately routed to Malaysia through Goodrich Overseas Group of Hong Kong into bank accounts in Malaysia controlled by Hendry Toon and the appellant. Furthermore, the prosecution proved that the monies routed to Malaysia were proceeds of 'unlawful activity' and that the appellant knowingly received substantial part of the proceeds to redeem the debts of a company partially owned by her.

SENTENCE

[43] Counsel for appellant submitted that the sessions court judge took into account irrelevant considerations in meting out punishment. He also submitted that the punishment is excessive. Some of the alleged irrelevant

considerations are that the appellant manipulated SP47, that AMLA offences are on the rise and that the offence had tarnished the country's image on the foreign investment front. Be that as it may, we are of the view that having regard to the amount of money involved and the degree of culpability on the part of the appellant, the punishment imposed cannot be regarded in any way as excessive.

[44] The maximum punishment for the 109/468 Penal Code offence is seven years imprisonment and fine. But the sessions court imposed only three years imprisonment for each count. In respect of all the AMLA charges, the maximum imprisonment is 15 years. The sessions court imposed only one year imprisonment on each count. As all the sentences were ordered to run concurrently, the appellant would be incarcerated for a total period of only three years. The sessions court judge stated that he had regard to the mitigating factors canvassed on behalf of the appellant but he struck a balance with the public interest. Having considered the calculated manner in which the offence was committed and the huge amount of funds procured from an overseas financial company, we cannot say that the sessions court erred in rejecting the plea that the appellant be bound over under s 294 of the Criminal Procedure Code on a good behaviour bond. We find that the sentence of imprisonment imposed by the sessions court is reasonable having regard to the circumstances of the case.

[45] In addition to the imprisonment terms, the sessions court also imposed a pecuniary penalty of RM6,394,530.72. This order was affirmed by the High Court. Counsel for appellant submitted that the 'fine' of RM6,394,530.72 exceeded the maximum fine provided by the law. We find no merit in this argument. It is true that s 4(1) of the AMLA provides for the imposition of a fine not exceeding RM5m. However, from the record, it is clear that the prosecution urged the sessions court to impose a pecuniary 'penalty' as opposed to a fine under s 55(2) of the AMLA. The provision reads as follows:

> 55 Forfeiture of property upon prosecution for an offence
>
> (1) Subject to section 61, in any prosecution for an offence under subsection 4(1) or a terrorism financing offence, the court shall make an order for the forfeiture of any property which is proved to be the subject-matter of the offence or to have been used in the commission of the offence or which is proved to be terrorist property where —
>
> (a) the offence is proved against the accused; or
>
> (b) the offence is not proved against the accused but the court is satisfied —
>
> (i) that the accused is not the true and lawful owner of such property; and
>
> (ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

A (2) *Where the offence is proved against the accused but the property referred to in subsection (1) has been disposed of, or cannot be traced, the court shall order the accused to pay as a penalty a sum which is equivalent to, in the opinion of the court, the value of the property, and any such penalty shall be recoverable as a fine.* (Emphasis added.)

B (3) In determining whether the property is the subject-matter of an offence or has been used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property the court shall apply the standard of proof required in civil proceedings.

C **[46]** Thus, the sessions court did not impose a fine under s 4(1) but imposed a pecuniary penalty under s 55(2) of the AMLA. Although, the penalty is 'recoverable as a fine' it is not the same thing as a fine under s 4(1). In the premises, the argument that the sessions court exceeded its power by imposing a fine beyond the limit prescribed in s 4(1) is without merit.

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[47] Counsel for appellant also argued that the penalty amount of RM6,394,530.72 was based solely on the submissions of the DPP at the sessions court. Upon perusing the record of appeal, we are of the opinion that this is not true. The appellant was charged with laundering a total sum of E RM41,337,727.11 under said eight charges. The investigating officer of the case (SP8) testified at the sessions court that the total sum that was seized was RM34,987,467.29. Thus, the difference between the two said amounts which is RM6,350,259.83 represents the money that was not recovered. The learned DPP arrived at a figure of RM6,394,530.72 in respect of the unrecovered F amount. This is because he made an arithmetic error in adding up the laundered amounts in the eight charges and arrived at a figure of RM41,382,008. However, the important point to note is that the submission of the learned DPP that a large sum of over RM6m was not recovered is based on the evidence of the investigating officer and that it is not a mere statement G from the bar.

[48] Learned counsel for accused also submitted that the pecuniary penalty should not be imposed for another reason. He said prosecution cannot show H what is the unrecovered sum in respect of each of eight charges. It may well be that it is impossible to determine the exact unrecovered sum under each eight charges as monies were paid out from the accounts and recovered later. However, it is indisputable that the total laundered sum under eight charges was RM41,337,727.11 and only RM34,987,467.29 was recovered. In the I premises, the total sum that cannot be traced is ascertainable. Therefore, we see no reason why the pecuniary penalty provision in s 55 of the AMLA cannot apply.

CONCLUSION

[49] For all the above reasons, we find no appealable error in the judgment of the sessions court and the High Court. We find the convictions on all the charges to be safe. The convictions recorded by the sessions court are affirmed. We also affirm the sentences imposed by the sessions court. However we shall make a correction in respect of the pecuniary penalty that the accused is liable to pay. We shall substitute the sum of RM6,394,530.72 with the sum of RM6,350,259.83 and round it to the figure of RM6.35m which will be the payable pecuniary penalty. The default imprisonment term imposed by the sessions court is affirmed.

Convictions and sentences by sessions court affirmed

Reported by Nabilah Syahida Abdullah Salleh